

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARIO ANTONIO BAUTISTA,

Petitioner,

v.

JOHN F. SALAZAR, Warden,
MATTHEW CATE, Secretary,
California Department of Corrections
and Rehabilitation,

Respondents.

No. C 08-4646 MMC (PR)

**ORDER DENYING PETITIONER'S
RENEWED MOTION FOR
APPOINTMENT OF COUNSEL AND
LEAVE TO PROCEED IN FORMA
PAUPERIS; GRANTING
EXTENSION OF TIME TO FILE
TRAVERSE**

(Docket Nos. 12, 13, 14)

On October 7, 2008, petitioner, a California prisoner incarcerated at Chuckawalla Valley State Prison in Blythe, California, and proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. By order filed March 16, 2009, the Court directed respondent to show cause why a writ of habeas corpus should not be granted based on petitioner's cognizable claims. Additionally, the Court denied petitioner's request for the appointment of counsel pursuant to 18 U.S.C. § 3006A(a)(2)(B), finding the interests of justice did not require appointment at this time. The Court also denied as moot petitioner's application for leave to proceed in forma pauperis, in that petitioner had paid the \$5.00 filing fee at the time he filed the petition.

On July 14, 2009, respondent filed an answer to the petition. Now pending before the Court are petitioner's renewed motion for the appointment of counsel and leave to proceed in forma pauperis, and petitioner's request for an extension of time to file a traverse to the

1 answer.

2 DISCUSSION

3 In 2006, petitioner was convicted of sexual penetration and the commission of lewd or
4 lascivious acts on a child under the age of fourteen. He was represented by counsel on
5 appeal and through the filing of his petition for review in the California Supreme Court. He
6 did not seek state habeas corpus relief.

7 As noted, the Court, in its March 16, 2009 Order to Show Cause, denied as moot
8 petitioner's application to proceed in forma pauperis and also denied petitioner's request for
9 the appointment of counsel. Specifically, with respect to the latter, the Court found as
10 follows:

11 Petitioner moves for the appointment of counsel to represent him in the
12 instant action. The Sixth Amendment's right to counsel does not apply in
13 habeas actions. Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th Cir.), cert.
14 denied, 479 U.S. 867 (1986). Pursuant to statute, however, a district court is
15 authorized to appoint counsel to represent a habeas petitioner whenever "the
16 court determines that the interests of justice so require and such person is
17 financially unable to obtain representation." See 18 U.S.C. § 3006A(a)(2)(B).
18 Here, petitioner's claims have been adequately presented in the petition and the
19 attached state court briefs, which were prepared by counsel on petitioner's
20 behalf. Consequently, the interests of justice do not require appointment of
21 counsel in the instant case at this time. Accordingly, the request for
22 appointment of counsel will be denied. Should the circumstances change
23 materially at a later stage of the litigation, the Court will reconsider this
24 decision sua sponte.

25 (Order, filed March 16, 2009, at 2:25-3:8.)

26 As noted, petitioner has filed a renewed motion for the appointment of counsel and, in
27 furtherance of such, also seeks a determination that he is entitled to proceed in forma
28 pauperis. In support of his motion, petitioner has filed his own declaration, as well as those
of his wife and of Meredith Fahn ("Fahn"), the attorney who represented him at all times
through his petition for review to the California Supreme Court. In particular, in her
declaration, Fahn asks to be appointed to represent petitioner in this matter, based on her
statements that (1) petitioner suffers from vision problems, having undergone cataract
surgery on each eye in the last year with resulting complications in his right eye, and (2)
upon reading the answer filed by respondent, she believes there is an important legal issue

1 not addressed by respondent that must be addressed in the traverse. (Decl. Meredith Fahn
2 Supp. Pet.'s Renewed Mot. Appt. Csl. ("Fahn Decl.") ¶¶ 5-6.) Specifically, Fahn cites the
3 recent Ninth Circuit case of Holley v. Yarborough, 568 F.3d 1091 (9th Cir. 2009), in which
4 the petitioner, who had been convicted of child molestation and lewd and lascivious conduct
5 on a minor, was granted habeas relief after he was denied the opportunity to cross-examine
6 the victim with respect to her prior sexual conduct. In the instant case, one of petitioner's
7 claims is that the trial court erroneously denied defense counsel the opportunity to cross-
8 examine the victim regarding her prior sexual conduct.

9 As set forth above, the Sixth Amendment does not require the appointment of counsel
10 in a habeas corpus action. Rather, the district court has the discretion to appoint counsel if
11 "the court determines that the interests of justice so require and such person is financially
12 unable to obtain representation." See 18 U.S.C. § 3006A(a)(2)(B). Here, the Court finds
13 neither of the requisite two factors warrant the appointment of counsel.

14 With respect to the "interests of justice," petitioner asserts the appointment of counsel
15 is required for two reasons. The first reason pertains to petitioner's vision problems.
16 Specifically, petitioner states that (1) because of scarring in his right eye from cataract
17 surgery he is unable to see out of that eye, and (2) without prescription glasses he is
18 "practically blind for reading or seeing anything up close." (Decl. Mario A. Bautista Supp.
19 Renewed Mot. Appt. Csl. ("Bautista Decl.") at ¶ 2-3.) Petitioner also states, however, that he
20 is scheduled for laser surgery in the near future to correct the problem in his right eye, and
21 that he was told in mid-June 2009 that he would be receiving corrective prescription glasses,
22 although he might have to wait for at least three months. (Id.) Petitioner concedes that
23 following such surgery and the receipt of his glasses, he should be able to file a traverse if
24 afforded an appropriate extension of time to do so. (Id. at ¶ 9.)

25 The second reason put forth by petitioner is his asserted inability to prepare a traverse
26 because of language and educational limitations. Specifically, petitioner states:

27 I was once an attorney, but practiced immigration law and have no knowledge
28 of criminal law or habeas corpus procedure. Moreover, English is not my
native language. In my opinion, there are meritorious grounds stated in my
petition. However, due to my lack of knowledge of the relevant areas of law,

1 exacerbated by English not being my native language, I am unable to skillfully
2 present or argue my case. Thus, I am in need of legal counsel.

3 (Id. ¶ 4.)

4 Petitioner's reasoning is unpersuasive. Petitioner is an educated individual who had
5 his own law practice until he was convicted in 2005. (See Docket No. 13 (In Forma Pauperis
6 Application) at 2:4-6.) Further, although English is not petitioner's first language, he is
7 proficient enough in its use to have attended law school, passed the California Bar
8 Examination, and practiced law in this state for eight years. In particular, the website of the
9 State Bar of California shows petitioner graduated from the Peninsula University Law School
10 in Mountain View, California, was admitted to the California State Bar in 1997, received an
11 interim suspension after he was convicted in 2005, and was disbarred in 2007. Moreover,
12 petitioner's lack of expertise in criminal and federal habeas corpus law does not require the
13 appointment of counsel under the circumstances pertaining here; specifically, petitioner has
14 available to him the extensive appellate briefs that were filed by counsel on his behalf in state
15 court, as well as the state court of appeal's opinion addressing each of petitioner's claims on
16 the merits, and has been made aware, by Fahn, of the potential relevance of the Holley case
17 to his action and thus can bring such case to the Court's attention in his traverse.

18 Moreover, the information provided by petitioner in his application to proceed in
19 forma pauperis does not lead to the conclusion that petitioner is financially unable to obtain
20 counsel to represent him. Specifically, although petitioner maintains that he has no personal
21 income and his most recent Certificate of Funds in Prisoner's Account shows that he has less
22 than \$20 in his account, he also acknowledges that his wife, Carmelina Bautista, is employed
23 in a law office and earns a gross monthly salary of \$1500. Consequently, even if petitioner
24 cannot afford to retain Fahn, the record shows that petitioner, based on his wife's income,
25 might be able to find other counsel to represent him; petitioner, however, has made no
26 showing with respect to any efforts on his part to do so.

27 Based on the above record, the Court finds petitioner has not shown that either the
28 interests of justice require the appointment of counsel at this time, or that he is financially
unable to obtain representation. Petitioner has shown, however, good cause for an extension

1 of time to file a traverse.

2 Accordingly,

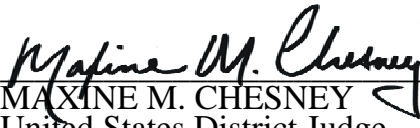
3 1. Petitioner's renewed motions for the appointment of counsel and to proceed in
4 forma pauperis are hereby DENIED;

5 2. Petitioner's request for an extension of time to file a traverse is hereby GRANTED.
6 Petitioner shall file his traverse within **ninety (90)** days of the date this order is filed. If
7 petitioner determines he will be unable to comply with this order due to delays in his
8 scheduled eye surgery and/or the receipt of his prescription eyeglasses, he may move for a
9 further extension of time.

10 This order terminates Docket Nos. 12, 13 and 14.

11 IT IS SO ORDERED.

12 DATED: October 6, 2009

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14 MAXINE M. CHESNEY
15 United States District Judge
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